U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEPHEN V. SWIFT and U.S. POSTAL SERVICE,
POSTAL INSPECTION SERVICE, San Bruno, Calif.

Docket No. 96-2144; Submitted on the Record;
Issued July 13, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant met his burden in establishing that he sustained a recurrence of disability on March 31, 1994 causally related to his accepted January 4, 1994 employment injury; and (2) whether the Office of Workers' Compensation Programs abused its discretion in approving attorneys fees in the amount of $1,330.00 and $1,300,00.

On January 5, 1994 appellant, then a 41-year-old communication equipment specialist, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging he suffered a low back strain on January 4, 1994 when moving heavy radio equipment in the course of his federal employment. The Office accepted this claim for lower back strain.

On April 4, 1994 Dr. Walter Welch, a physician Board-certified in emergency medicine, diagnosed a lumbar strain.

On April 6, 1994 Dr. M.J. Miech, a Board-certified family practitioner, diagnosed chronic recurrent lumbosacral strain and indicated this was from appellant's January 4, 1994 injury. The physician indicated that appellant was unable to work on April 6, 1994.

On April 21, 1994 appellant filed a notice of recurrence of disability alleging that he suffered a recurrence on March 31, 1994. Appellant stopped work on March 6, 1994. In an attached letter, appellant indicated that his back pain became more severe on or about March 1, 1994. He stated that his back condition steadily worsened and that he sought emergency treatment on April 4, 1994.

On April 25, 1994 Dr. Charles Nebesar, a physician Board-certified in emergency medicine, diagnosed low back strain. He indicated that appellant's back began hurting about a month prior to his report.

On May 20, 1994 Dr. Robert Riesenfeld, a Board-certified internist, indicated that appellant could return to work on May 20, 1994 with limitations of standing/walking 2 hours at a

time for 4 hours a day, with no kneeling, with lifting 0 to 10 pounds frequently, and with lifting 11 to 25 pounds occasionally.

On June 13, 1994 the Office requested additional information, including a rationalized medical opinion addressing the causal relationship between his current condition and his original injury. Appellant was given 30 days to respond.

In a June 27, 1994 statement, appellant indicated that on January 26, 1994 he lifted a power supply, no heavier than his regular equipment, so that he could recharge a car battery. Appellant also indicated that on March 24, 1994 he was stranded in an automobile stuck in snow and assisted in freeing the vehicle. He stated this incident did not result in injury, back pain, or negative effects

Appellant's supervisor subsequently indicated that appellant did not report any problems on March 31, 1994, the date of his alleged recurrence. He stated that after appellant's original injury he continued to work without reporting back problems. He stated that on May 25, 1994 appellant unloaded several motorcycles, one weighing 350 pounds, and rode 5 to 6 hours. He also indicated that appellant pushed a vehicle out of a snow bank on March 24, 1996.

On May 25, 1994 the postal inspector indicated that it interviewed George Lewis. According to the postal inspector, Lewis stated appellant unloaded a 350-pound motorcycle down the ramp of a pick-up truck in March and rode the motorcycle for five to six hours. The postal inspector further indicated that Lewis only noticed appellant complaining about his back immediately after the original incident.

The postal inspector also interviewed Dennis Dietz, who indicated that appellant helped push a truck out of a snow bank on March 24, 1994 and that he did not mention back troubles.

By decision dated September 7, 1994, the Office rejected appellant's claim for a recurrence because he failed to submit a rationalized medical opinion relating his current condition to his accepted employment injury.

On April 27, 1995 appellant requested reconsideration. In support, appellant submitted a March 3, 1995 report from Dr. Allan C. Bushnell, Jr., an occupational medicine specialist Dr. Bushnell noted the employment incident dated January 4, 1994, which resulted in the original injury, and reviewed appellant's treatment history. Dr. Bushnell indicated that he initially saw appellant on August 22, 1994 for recurring back pain. He subsequently examined appellant on September 2, September 30 and October 28, 1994. He opined that appellant was totally disabled from his regular work and diagnosed chronic low back pain.

Appellant also submitted a January 31, 1995 letter from Dr. Margaret E. Hegg, a Board-certified internist. Dr. Hegg indicated that she had treated appellant for back problems since January 1994. She stated that a return to his regular job resulted in a relapse of symptoms due to the weight lifting requirements of the job. Dr. Hegg opined that ill-advised home activities, such as motorcycle riding, were only minor aggravants to his condition compared to the daily strain of his regular work.

Finally, appellant submitted treatment notes indicating that appellant suffered low back symptoms, but the notes did not address the etiology of appellant's condition.

By decision dated July 14, 1995, the Office reviewed the merits of the case and found that the evidence was insufficient to warrant modification of the previous decision.

On July 27, 1995 appellant's representative submitted a detailed fee petition indicating that he performed 13.30 hours of legal services at an hourly rate of $100.00. He, therefore, requested a fee of $1,330.00. The representative indicated that he communicated with appellant, the Office, and medical providers, and that he prepared the request for reconsideration.

On July 29, 1995 appellant stated he had no objection to his representative's fee request.

By decision dated August 30, 1995, the Office approved the fee of $1,330.00 pursuant to 5 U.S.C. § 8127 and 20 C.F.R. § 10.145. In its findings of fact, the Office indicated that appellant did not object to the fee. The Office then stated it examined the record and found the fee reasonable based on the usefulness of the representative's services, the nature and complexity of the claim, the actual time spent on the development and presentation of the claim, the amount of charges for similar services, and the qualifications of the representative.

On February 1, 1996 appellant again requested reconsideration. In support, appellant submitted a November 7, 1995 report from Dr. James D. Fontaine, a specialist in physical and occupational medicine. Dr. Fontaine noted appellant's January 4, 1994 injury, performed an examination, and interpreted a magnetic resonance imaging. He diagnosed mechanical low back pain with only mild degenerative changes. He further stated appellant could return to work.

Appellant also submitted a December 11, 1995 report from Dr. Dominic Tse, a Board-certified orthopedic surgeon. Dr. Tse reviewed appellant's work history , including his January 4, 1994 injury. He also reviewed the March 1994 incident when appellant pushed a car from a snow bank. He stated that appellant did not feel increased back discomfort or back pain. Dr. Tse stated that several days later appellant experienced a recurrence of his back condition without a precipitating event. Dr. Tse conducted a physical examination and reviewed the medical records. He stated that there was a specific back injury on January 4, 1994 that did not resolve over the next three months. He noted that symptoms were exacerbated on or about March 31, 1994 without a precipitating event. He stated that this represented a recurrence of the original injury dated January 4, 1994 from which appellant never fully recovered. He stated that this was mechanic back pain with an underlying low back pathology. He found a degenerative disc condition in the lower lumbar segments, L4-5 and L5-S1, along with facet arthopathy. He also found a small L5-S1 disc protrusion. Dr. Tse continued that the January 4, 1994 incident caused an acute lower back injury which resulted in lumbar strain and dysfunction. He stated it also aggravated the arthritis condition of the lower spine. He noted that there was an element of cumulative trauma due to appellant's occupational activities. He stated that this became prevalent after the low back injury. He indicated that appellant's driving activities and loading duties affected the back. He diagnosed chronic lumbar dysfunction and strain. He stated that there was also degenerative arthritis and discopathy of the lower spine, a preexisting condition, previously asymptomatic prior to the January 1994 injury.

By decision dated April 8, 1996, the Office reviewed the merits of the claim and denied modification of its prior decision because they record failed to contained a reasoned opinion indicating that appellant suffered a recurrence on March 31, 1994 causally related to his January 4, 1994 accepted employment injury.

On April 22, 1996 appellant's representative submitted a detailed fee petition indicating that he performed 13.00 hours of legal services at an hourly rate of $100.00. He, therefore, requested a fee of $1,300.00. The representative indicated that he communicated with appellant, the Office, and medical providers, and that he prepared the request for reconsideration.

On April 19, 1996 appellant stated he had no objection to his representative's fee request.

By decision dated April 30, 1996, the Office approved the fee of $1,300.00 pursuant to 5 U.S.C. § 8127 and 20 C.F.R. § 10.145. In its findings of fact, the Office indicated that appellant did not object to the fee. The Office then stated it examined the record and found the fee reasonable based on the usefulness of the representative's services, the nature and complexity of the claim, the actual time spent on the development and presentation of the claim, the amount of charges for similar services, and the qualifications of the representative.

The Board initially finds that this case is not in posture for decision.

Where appellant claims a recurrence of disability due to an accepted employment-related injury, he has the burden of establishing by the weight of the reliable probative evidence that the recurrence of the condition for which she seeks compensation is causally related to the accepted employment injury.[1] As part of this burden, appellant must submit rationalized medical opinion evidence based on a complete and accurate factual and medical background showing a causal relationship between the current condition and the accepted employment-related injury.

However, proceedings under the Federal Employees' Compensation Act are not adversarial in nature, nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence so that justice is done.[2]

In the instant case, appellant must establish that on March 31, 1994 he suffered a recurrence of disability causally related to his January 4, 1994 accepted employment injury. Medical reports supporting recurrence of disability on March 31, 1994 were submitted by Drs. Miech, Hegg, and Tse. Dr. Miech. A Board-certified family practitioner, submitted a report on April 6, 1994 diagnosing a chronic recurrent lumbosacral strain. Dr. Miech's opinion, however, is entitled to little weight because he provided no explanation for his conclusion.[3] Similarly, Dr. Hegg, a Board-certified internist, failed to explain her conclusion that appellant's return to his regular work result in a relapse of his symptoms. Absent a complete medical

[1] *See Henry L. Kent*, 34 ECAB 361 (1982); *Dennis E. Twadzik*, 34 ECAB 536 (1983).

[2] *William J. Cantrell*, 34 ECAB 1223 (1983).

[3] *See Nicolea Bruso*, 33 ECAB 1138 (1982).

rationale, Dr. Hegg's report is also entitled to little.[4] Dr. Tse, a Board-certified orthopedic surgeon, provided the most complete opinion supporting that appellant suffered a recurrence of disability. Dr. Tse, however, attributed appellant's condition both to a spontaneous recurrence of disability on March 31, 1994 and to an underlying degenerative disease that has been aggravated by the nonspecific driving and loading appellant accumulated during the course of his federal employment. Dr. Tse, therefore, provided a conflicting opinion regarding whether appellant acquired on new occupational disease or suffered a recurrence of disability. Consequently, his opinion is of diminished value.[5]

Although the reports of Drs. Miech, Hegg, and Tse are insufficient to completely discharge appellant's burden of establishing by the weight of the reliable, substantial, and probative medical evidence that the March 31, 1994 alleged recurrence was causally related to appellant's January 4, 1994 accepted injury, they constitute sufficient evidence in support of appellant's claim to require further development of the record by the Office.[6]

Upon remand, the Office should refer appellant, along with a statement of accepted facts and the case record, to an appropriate medical specialist for a well-rationalized opinion, based on a complete and accurate factual and medical background, regarding the causal relationship between appellant's accepted January 4, 1994 injury and his current conditions. The Office should thereafter issue a *de novo* opinion on appellant's entitlement to benefits.

The Board, however, also finds that the Office did not abuse its discretion in approving attorney fees in the amount of $1,330.00 and $1,300.00.

It is not the Board's function to determine the fee for representative services performed before the Office. That is a function within the discretion of the Office based on the criteria set forth in 20 C.F.R. § 10.145 and mandated by Board decisions. The Board's sole function is to determine whether the action by the Office constituted an abuse of discretion.[7] The criteria governing the approval of fees for a representative's services are provided in 20 C.F.R. § 10.145(b) which states:

> "(b) The fee approved by the Office will be determined on the basis of the actual necessary work performed and will generally include but are not limited to the following factors:

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[4] *Id.*

[5] *William S. Wright*, , 45 ECAB 498 (1994).

[6] *See Horace Langhorne*, 29 ECAB 821 (1978) (when the attending physician provided no rationale for his conclusion that appellant's hearing loss was causally related to his occupational noise exposure, and the Office medical adviser provided no rationale for his opinion that appellant's hearing loss was not so related, the medical evidence was insufficient to establish appellant's claim, but was sufficient in support thereof to require further development of the record by the Office). The Board notes that in this case the record contains no medical opinion evidence contrary to the claim and further notes that the Office did not seek advice from an Office medical adviser or refer the case to an Office referral physician for a second opinion.

[7] *Russell Thomason*, 35 ECAB 781 (1984).

(1) usefulness of the representative's services to the claimant.

(2) The nature and complexity of the claim.

(3) The actual time spent on development and presentation of the claim.

(4) The amount of compensation accrued and potential future payments.

(5)Customary local charges for similar services.

(6) Professional qualifications of the representative."

The Office properly considered all the criteria set out at 20 C.F.R. § 10.145(b) in its August 30, 1995 decision awarding a fee of $1,330.00 and in its April 30, 1996 decision awarding a fee of $1,300.00. As noted above, the Board's sole function is to determine whether the action taken by the Office in the matter of the attorney's fee constituted an abuse of discretion. Abuse of discretion is generally shown through manifest error, clearly unreasonable exercise of judgment, or action taken which are contrary to both logic and probable deductions from known facts.[8] There is no evidence in this case that the Office abused its discretion in approving these attorney's fees.

[8] *Daniel J. Perea*, 42 ECAB 214 (1990).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated April 30, 1996 and August 30, 1995 awarding attorney fees are affirmed, the decisions of the Office dated April 8, 1996 and July 14, 1995 are set aside, and the case remanded for further development and a *de novo* opinion in accordance with this decision.

Dated, Washington, D.C.
July 13, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member